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IN THE

Supreme Court of the United States

October Term, 1966

No. 625

In the Matter of

THE PETITION OF HANS-OLA T. MALMSTEDT
FOR THE ADOPTION OF A MINOR

Hans-Ola T. Malmstedt, Petitioner

REPLY BRIEF FOR PETITIONER

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Respondent Mother and Respondent Church Mission raise three arguments in opposition to the Petition for Certiorari filed by Petitioner-father. They are:

1. that constitutional question now pleaded by the Petitioner was not raised below, (Res. Br. 5);

2. that Maryland's statutory requirements for denial of an adoption petition have been met throughout (Res. Br. 6); and

3. that the denial of this adoption simply reflected Maryland's application of the "best interests" rule to this father's petition and transgressed no constitutionally protected rights, (Res. Br. 7)

Petitioner will reply briefly to each contention.

1. The constitutional question in this case was never raised until Maryland's Court of Appeals converted the "best interests" test in adoption cases into a threshold disqualification of natural fathers to seek adoption of this illegitimate child. Moreover, Petitioner's constitutional standing under the case law, as it stood as of briefing, and argument below, was made clear to the Maryland Court of Appeals.

In the history of this case the emergence of the precise constitutional issues relied on by the Petitioner occurred only when the Maryland Court of Appeals entered its judgment and opinion. Only at that time did the denial of this father's Petition go beyond the facts of the case and beyond a simple exercise of judicial discretion.

The trial Court's decree, upon which its judgment must rest, contained the following findings:

(at E-96)

> "4. That the Intervenor, [*] has not consented to the Petition of the Petitioner and has opposed said Petition;"
>
> "5. That the consent of the Intervenor [*] was not withheld contrary to the best interests of the child."

Thus, the determinant for the trial Court was the absence of the consent of the mother. In determining that the mother had not unreasonably withheld her consent, the trial Court, in both its oral and written opinion, recited its conclusions that the Respondent Mother had given careful consideration to this Petition and had rational bases for opposing it.

* The name of the Respondent-Mother is omitted.

(at E-93)

> "1. Now it would appear to the Court that the mother of this child gave careful consideration as to what she was going to do with the child, and what would be for the best interest of this child, before she placed the child with the Church Mission of Help of the Diocese of Maryland, Inc., with the intention that they should be granted guardianship with the right of adoption, and it was her considered judgment, and she is a young girl, twenty years of age, that it would be best for all parties concerned that this child be adopted by a responsible, and, as she stated, "young couple" who could give it love, affection and raise it as their own child, while it is quite young rather than have the child know the father and know that the mother had determined that she did not want to keep the child, and that it had been turned over by the Court to the father, because the mother did not want the child; and I think that would be a very unusual situation and one that certainly would not be in the best interest of this poor child.

and

(at E-99)

> Her decision in this case was made after careful consideration as to what, in her opinion at least, would be for the best interests of the child.

and

(at E-99

> In the instant case the mother has never given her consent to the adoption of her child by the Petitioner and has refused

to do so because, in her opinion, it is not in the best interest of the child."

and

(at E-100)

> As stated by the witness Mrs. Johns, a child should be placed in a family where there is a father and mother to give the child a normal family experience and who would love and raise her as their own. Here the child, knowing that she was adopted by an illegitimate father would want to know why her mother did not want her, which, in reality, would be manifestly unfair to the mother. The plan as thought out by the mother for the child's adoption appears to be the best suited to insure the child's welfare, best interests and future happiness.

For the trial Court, therefore, the issue was entirely the matter of the Respondent Mother's [redacted] and whether it had a rational, reasonable basis. The Court found that she did. It is submitted that this decision skirted the constitutional pitfall that the majority of the Court of Appeals so squarely raised: the threshold disqualification of the father because of the fact of illegitimacy. Rather, the trial Court simply ascertained that the Respondent Mother's consent had been withheld and that she had reasonable grounds for doing so.

It is true that the language quoted from E-100, *supra*, inferentially raises the spectre of raising the child as an illegitimate child as the ground for both the Respondent Mother's opposition and the trial Court's concurrence in it. It is submitted, however, that a full reading of the decree and both the oral and

written opinions of the trial Court wholly diffused this point, subordinating it to the primary issue of the reasonableness of the mother's objection.

Nevertheless, Petitioner felt that it was necessary to demonstrate to the Court of Appeals that he had certain constitutional standing which could not be ignored simply because (1) the Maryland statute did not require that he be notified of his child's adoption, and (2) the child's mother had been given a veto against his adoption of his infant girl. Accordingly, at pages 34-36 of Petitioner's brief to the *Court of Appeals* (which is attached to the sealed record filed in this Court). Petitioner argued that *Armstrong v. Manzo*, 380 U.S.545, gave him constitutional protection. Petitioner there argued:

(at 35-36)

> "The appellant in this case like Mr. Armstrong is the parent and natural guardian of this child. Art. 72A, Section 1, Art. 1, 16, Section 66 and 66H, and, as we pointed out above, he has a right to priority as to custody over all but the mother so long as he is not unfit.
>
> "It is exactly these kinds of rights with which the Supreme Court was concerned in *Armstrong* in the earlier case of *May v. Anderson*, 345 U.S. 528, 533, 97 L. Ed. 1221, 1226, 73 S. Ct. 840."

This was as far as Petitioner could go because Maryland's discrimination against him as a Petitioner for adoption was far from clear. When briefing and argument took place before the Court of Appeals, the very most that could be said was that the unequal application of the Maryland adoption laws was lurking

about the periphery of the case. And so Petitioner noted his constitutional standing before the Court of Appeals.

Moreover, when briefing and argument took place below, it was not at all clear that this Court would include within the constitutionally - protected relationship of father and child the tie between the natural father and his *illegitimate* child. The child in *Armstrong v. Manzo, supra,* decided before the present case was heard below, was born *in wedlock* Petitioner's briefs were filed below on January 21, 1966 (his Main Brief) and on April 7, 1966. Argument was held before the Court of Appeals on April 26, 1966. It was not until this Court ruled in *Selman v. Phillips*. 384 U.S. 210, on *May 16, 1966,* that Petitioner could urge on *any* Court that the relationship between a natural father and his illegitimate child had been granted constitutional protection of any kind. Accordingly, Petitioner submits that he has asserted the constitutional grounds available to him in a manner appropriate to the issues as formed below.

2. Petitioner does not contest that the Maryland Court of Appeals did apply the *form* of the State's standard for adoption, that of "best interests of the child", in denying the Petitioner-father's Petition below. But this Court can and should, it is submitted, look beyond the repetition of these magic words by the Court below to its real and explicitly stated basis of decision (See pp. 7-8, *infra*) in order to determine if constitutional injury has occurred.

Moreover, blind and automatic adherence to the various rubrics that recur in custody and adoption cases raises certain dangers The "best interests of the child test" – most often applied in these cases – is itself capable of misuse if all other rights and considerations in these often-complex situations are

ignored. Empowering a Court to act without restriction "in the child's best interest" gives it license to invade the parental relationship at will if it happens to feel the child would benefit more elsewhere.[1] Thus the rubrics and maxims — including the "best interest of the child" standard — must be tempered with consideration of the various individual rights involved. A father's — *this* father's — entitlement to constitutional equal protection is just such a consideration. Indeed, it is not articulating an advanced view to state that modern medical science's recognition of the special emotional needs of illegitimate children should be reflected in judicially recognized rights possessed *by these children*. These rights cannot be airily dismissed or arbitrarily rejected out of moral censure of the parents or of illegitimacy overall. Illegitimate children, all illegitimate children, suffer hurts, as the child psychiatrist in this case testified without opposition, which in certain instances can be best and most effectively ameliorated by their own natural parents.[2] This, certainly, forms the kernal of an entitlement possessed by any illegitimate child. This entitlement was ignored by the Court below when it refused to judge the fitness of this father and converted the "best interests" rubric into an all-empowering writ, blind to both the rights of the parent and those of the child.

3. Both Respondents contend that the Petitioner raises issues not involved in the case. It is contended by them that *if* the best interests of the child would have been served by this adoption, the Petition would have been granted. To this, Petitioner simply asks this Court to examine the opinion below and determine

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[1] See the recent note at 79 Harvard Law Review 1710

[2] See E.54 through 66

why the Maryland Court of Appeals held that this adoption was not in the best interest of the child. The answer is plain. The Petitioner's fitness to raise his child was deemed irrelevant. The majority stated:

(Pet. App. A-2)

> The appellant seems to think that the trial judge found him unfit to raise a child. This is not true. It was unnecessary for the judge to reach that question, and we do not reach it either. Our only question is to determine what the welfare of the child demands.

It was because the child was to be raised by the Petitioner as an illegitimate child, that the majority acted to separate them permanently:

(Pet. App. A-4)

> The facts, we think, speak for themselves, and it would be rather useless to point out in detail all of the reasons that sustain the Chancellor's ruling. It should be apparent to all that through infancy, adolescence, and young ladyhood it will be decidedly more advantageous to be raised in a normal, wholesome home with a mother and a father, than to be reared as an illegitimate child by the father alone, with the many potential, possible complexities and problems attendant to such a rearing. It is obvious to us that the facts impelled the Chancellor's holding; consequently, we not only find no reason to disturb his ruling, but state that had it been otherwise, we would have had to change it.

The majority felt that regardless of the blood tie, it had devised a better future for Petitioner's daughter:

(Pet. App. A-4)

> If the action of the Chancellor be sustained, the agency is ready to proceed with a normal, customary adoption proceeding, whereby the child will be placed in a suitable home with a father and a mother.

There is the definition of "best interest", as Maryland conceives of it, in a situation where a father seeks only to establish his fitness to care for his infant child.

Respondents then contend that no unwarranted state interference with the blood tie is involved herein, since:

> "the relationship is analogous to a charge in a divorce case that awarding custody to one parent is an interference with the relationship between the child and the other parent." (Res. Br. 8)

But that is precisely Petitioner's point. If this father were before the Maryland Courts in a divorce case and custody of his child were at stake — and he were opposed by unknown and undesignated strangers — he would be entitled to the very adjudication of his fitness as a parent that Maryland has denied him in this case. It is *this* denial that so graphically demonstrates the unequal application of the Maryland adoption laws. Under the formulation of the majority of Maryland's Court of Appeals, this Petitioner is uniquely and peculiarly barred — as no other Petitioner would be — from raising his own daughter because he is her father and because she was born out of wedlock.

Petitioner asserts no statutory right to custody of his child, as Respondents contend (Res. Br. 8). Rather, he asks only even-handed administration of

the State's adoption laws. He seeks no change in the traditional weighing — by the trial judge — of the best interests of the child as a determinant in adjudicating what the child's future shall be. But he points to Maryland's defiance of the blood tie in favor of sealing off a child from her unwed father as clear indication that Maryland's application of that standard has gone awry, constitutional awry. In sum, Petitioner argues only that he has a constitutional right to seek his child in parity with all other natural fathers.

In this view he is supported not alone by constitutional sanction but also by the clear pronouncements of the Maryland legislature which very much favors preservation of the very blood ties which the majority of Maryland's high court has severed.

CONCLUSION

Wherefore, the Petitioner prays that this Court review and reverse the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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